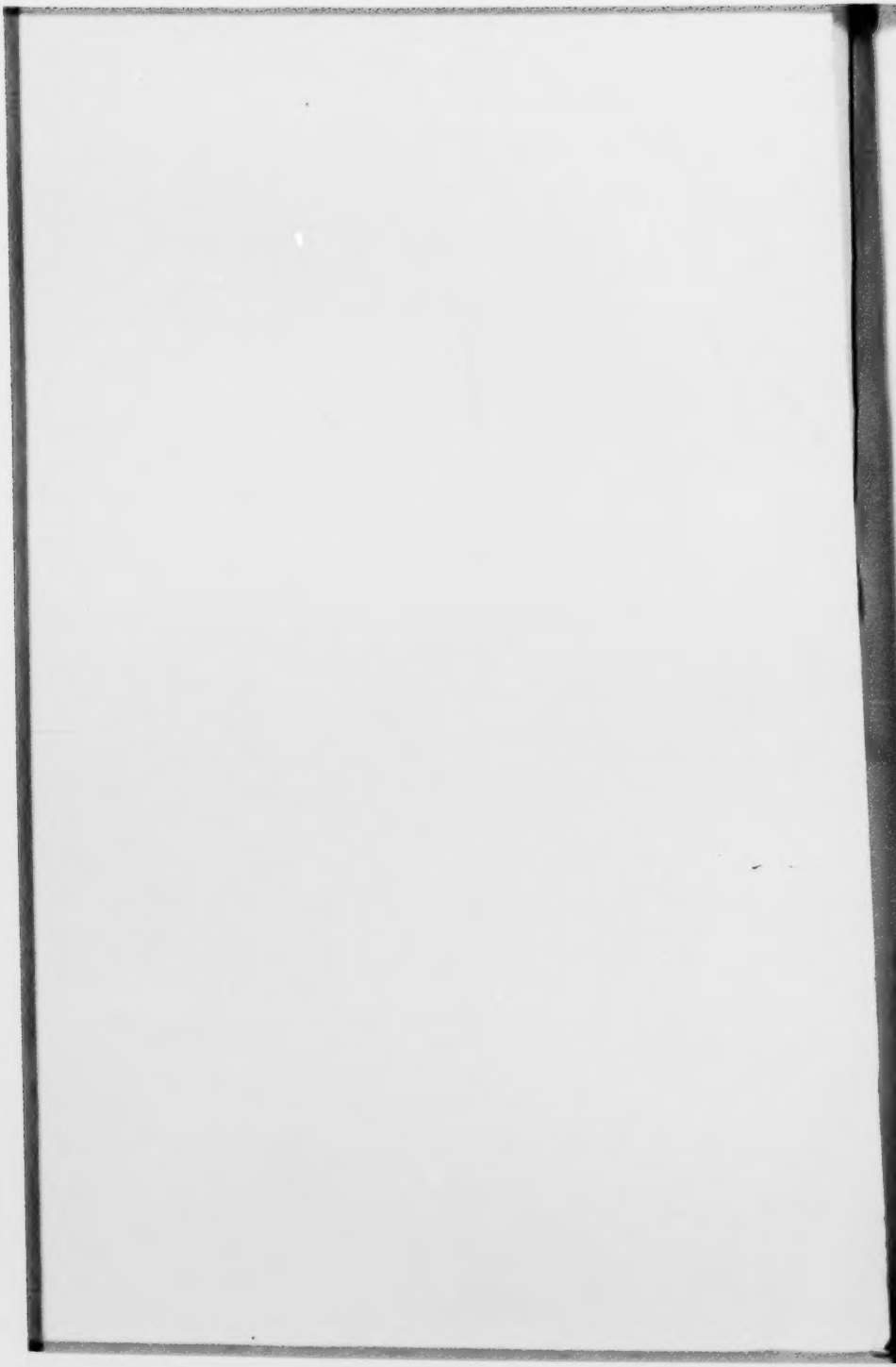


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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 295

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

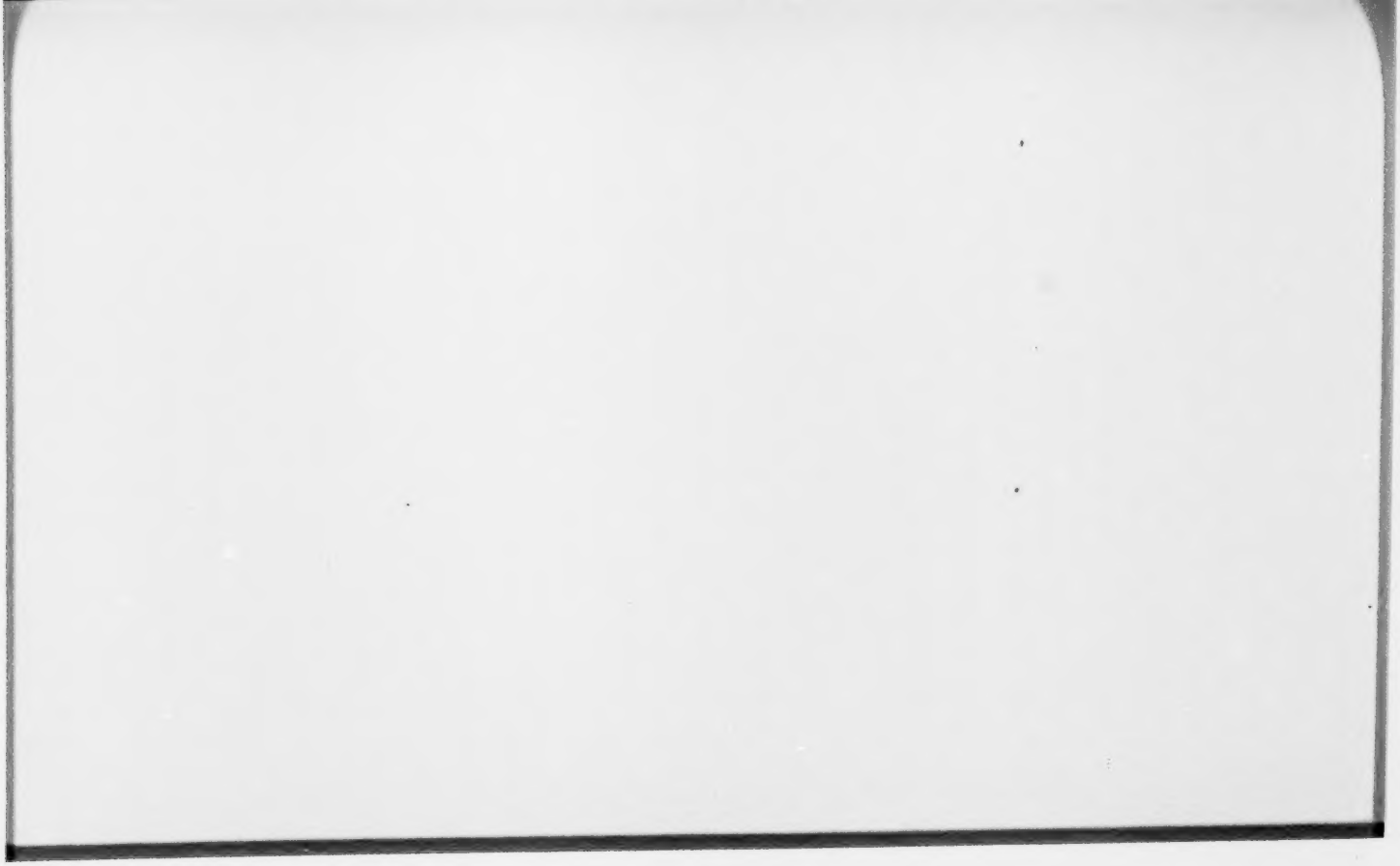
GEORGE POLAKOFF AND WILLIAM ALBERT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

IRVING SPIELER,
Counsel for George Polakoff;
LOUIS HALLE,
Counsel for William Albert.

SAMUEL MEZANSKY,
LOUIS HALLE,
Of Counsel.



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GEORGE POLAKOFF AND WILLIAM ALBERT.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION.

Opinion Below.

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 300-308) is reported in 112 F. (2d) 888.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on June 26th, 1940 (R. 308). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code,

as amended by the Act of February 13th, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court on May 7th, 1934.

Question Presented.

Whether, under the circumstances of this case, the interception by Federal agents without the knowledge or consent of the respondents of declarations made by them by telephone to a government witness acting under the direction of the agents would be a violation of Section 605 of the Federal Communications Act.

Statute Involved.

Section 605 of the Federal Communications Act (c. 652, 48 Stat. 1064, 1103, 47 U. S. C., Sec. 605) provides in part as follows:

> "* * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * * and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: * * *."

Statement.

Respondents were indicted for conspiracy under Section 37 of the United States Criminal Code. Upon the first trial which commenced on November 28th, 1939, the jury disagreed. Upon a second trial which commenced on January

3rd, 1940, the respondents were found guilty by the jury (R. 266) and each was sentenced to two years' imprisonment (R. 6-7).

Upon appeal by the respondents to the Circuit Court of Appeals for the Second Circuit, respondents' convictions were reversed. The majority opinion of the court was delivered by Judge Learned Hand (R. 300); a concurring opinion was delivered by Judge A. N. Hand (R. 303); Judge Clark dissented by written opinion (R. 304).

Respondents had never been previously either convicted or arrested for any crime (R. 161).

In general, the indictment charged that the respondents did corruptly represent to one Sidney Kafton, who had been indicted for violation of the Narcotic Laws that they could and would procure in return for a sum of money between $500 and $1000, the imposition of a sentence upon Kafton of not more than one year and one day; that the respondents "did corruptly do certain acts with intent to influence and impede the official acts of officers in and of the United States District Court for the Southern District of New York with respect to criminal cases" pending against Kafton in order that Kafton would receive a sentence of not more than one year and one day (R. 5).

The government's case depended chiefly upon the testimony of one Sidney Kafton, a notorious criminal. While in the United States Navy, he had been court martialed and sentenced to Portsmouth prison for a term of five years for "gambling and against good morals" (R. 38). In 1920 he had pleaded guilty to an attempted holdup of a fur store (R. 35). For this crime he served a sentence of 22 months and 8 days (R. 35). On July 28th, 1939, he was arrested and charged with conspiring to possess, conceal and sell narcotic drugs. An indictment for this crime was filed on August 4th, 1939 (R. 4). Kafton was released on bail in

August, 1939 (R. 21). Upon his release on bail, Kafton went to Putnam County in the State of New York where he pleaded guilty to malicious mischief, arising out of the "rifling" of telephone boxes (R. 22). He received a sentence of 30 days together with a fine of $100 (R. 22). He began serving his sentence for this crime on August 24th, 1939, and was released on September 22nd, 1939 (R. 22).

The history of the accusation in this case against the respondents begins with the return of Kafton to New York City on September 27th, 1939, after he had completed his sentence for malicious mischief in Putnam County (R. 41). He was still under two indictments in the United States District Court for the Southern District of New York for conspiring to sell and for the sale and possession of narcotics (R. 19) and up to that time no disposition had been made of those cases.

Upon return to New York City, Kafton became an informer for the government (R. 41) and worked under the direction of Mr. John E. Tagley, an agent in the Bureau of Narcotics (R. 197). In the early part of his career as an informer, he received expense money from the government (R. 197) and beginning with November 8th, 1939 he began to receive $35 a week from the office of the United States Attorney (R. 45).

Kafton testified that the respondent, Albert, whom he says he met accidently, had proposed to him that if Kafton paid him a fee of $750 he could guarantee him a sentence of not more than one year and a day (R. 24-25). Kafton reported the conversation to the Bureau of Narcotics (R. 25). According to the theory of the government, respondent Polakoff under the alleged conspiracy was to be the person who contacted the Assistant United States Attorney to endeavor to have him recommend upon Kafton's plea of guilty, a sentence of two years (R. 82).

Although Kafton knew that the respondents, Albert and Polakoff were useless to him and that he did not need their help in the slightest degree, Kafton, after pre-arrangement with government officials, persisted in contacting Albert and Polakoff to see what steps they would take to consummate the idle boast made by the respondent Albert. The Assistant United States Attorney who was to be influenced under the alleged conspiracy was fully informed about the alleged scheme by Kafton and the Narcotic agents (R. 82). The whole chain of circumstances developed in the case, was the result of the planned, persistent and concurrent actions by Kafton and officials to entrap the respondents.

Both respondents took the stand in their own behalf and testified to facts which negatived the theory of the government that they intended to corruptly influence the Assistant United States Attorney.

The judgment of conviction of the respondents was reversed on the ground that the recordings of intercepted telephone calls were improperly received in evidence.

Unfortunately, the government's petition does not describe the circumstances surrounding the interception of the telephone calls. The facts in connection with these telephone calls assume some importance. The majority opinion refers to the interception as the "intervention of prosecuting agents bent upon trapping the sender". The majority opinion's characterization of these intercepted messages finds conclusive support in the record from which we shall quote. They were not, as described by the dissenting judge, communications which had reached their intended destination and were recorded at one end of the line by the direction of one of the participants (R. 304).

Kafton testified upon direct examination that he conversed with the respondent Albert over the telephone (R. 27-28). Kafton also testified that on October 24th, 1939 he talked to the respondent Polakoff (R. 30-31).

Upon his direct examination, the witness Kafton testifying for the government did not intimate that he had consented to or had known of the interception of the telephone conversations. As a matter of fact, he testified upon direct examination that he did not know that someone was listening in on the conversation (R. 56). Upon rebuttal for the first time it appeared that the telephone conversations had been intercepted by agents of the Federal Bureau of Investigation by means of a recording device which recorded the telephone conversations on a disc or phonograph record. Upon rebuttal, the government introduced in evidence the records and they were played for the jury (Exhibits 5 and 6; R. 212, 213, 216-218).

In order to supply the "consent of the sender", which the prosecutor believed satisfied the requirements of the statute and made all of the conversations, including respondents' admissions, admissible, Kafton was recalled as a witness of the government (R. 203). The following spectacle was then enacted. Kafton testified that on August 18th, 1939 and again on October 24th, 1939 when he had made the two telephone conversations from the office of the Bureau of Investigation, Mr. Carl A. Herring, an agent "told him" that a recording was to be made and asked him whether he had "any objection" (R. 203-205).

The telephone conversation between Kafton and Polakoff was made by Kafton on October 24th, 1939 (R. 30). At noon, Kafton made arrangements with Mr. Herring, agent for the Federal Bureau of Investigation to make the call to Polakoff from the office of the Federal Bureau of Investigation at 11 o'clock that evening (R. 206). By appointment he met Herring that evening on Centre Street in the City of New York and went with him to the sixth floor of the Federal Building (R. 206).

Although apparently the two had made arrangements to make the call that evening, the following formal conversa-

tion allegedly took place between the agent of the Federal Bureau of Investigation and Kafton, the informer then under indictment acting under directions (R. 202):

"Q. Did you make a phone call? A. Yes.

Q. And did you have a conversation with Herring before, about the phone call? A. Yes, sir.

Q. What was the conversation? A. He told me again there was to be a recording made and did I have any objection.

The Court: What did you say?

The Witness: No.

Mr. Siegel: This is all under objection and exception to this entire line.

The Court: Yes.

Q. Did he tell you a recording was going to be made or did he ask you was it all right to make a recording? A. He asked me, he told me, he asked me if there was any objection to his making a record of the phone call."

From the last question in the portion quoted, it is evident that the prosecutor was not satisfied with the answer of the witness that the agent had "told him" that a recording was to be made. When the prosecutor questioned the witness specifically as to whether the agent "asked him" or "told him" that his recording was to be made, the witness, obviously confused, answered: "He asked me, he told me, he asked me" (R. 204).

It should be noted that this conversation did not take place at the time arrangements were made for the telephone call, but as the witness stated, he could not recall "whether he 'asked me' on the way up or 'told me' on the way up, or just before I made the call" (R. 206).

The same performance between the agent and Kafton had been given on an earlier occasion (R. 203-204).

If the transcript of the conversation between Kafton and the respondent, Polakoff, is read (Ex. 6; R. 216-218), it will

become evident that Kafton's statements to Polakoff were apparently made under the promptings of the Federal agents. Requests and inquiries by Kafton were deliberately interjected by Kafton in these conversations so that any response or even if the respondents remained silent, would be seriously prejudicial to them.

We have, therefore, a deliberate resort to wire tapping, to entrap the respondents criminally.[1]

Reasons for Denying the Petition.

The decision of the Circuit Court of Appeals was plainly compelled by the decisions of this Court in *Nardone* v. *United States*, 302 U. S. 379; *i. d.* 308 U. S. 338, and *Weiss* v. *United States*, 308 U. S. 321.

Judge Augustus N. Hand in his concurring opinion wrote as follows (R. 303-304): "In the face of the foregoing Supreme Court decisions any remedy must rest with the Congress who, in my opinion, can constitutionally permit wire tapping by government authorities with or without such safeguards against abuse as Congress may see fit to impose."[2] After the decision of the Circuit Court of Appeals and as this is written, the House of Representatives has passed and there has been referred to the Senate Committee on Interstate Commerce the bill, H. J. Res. 571, "to authorize

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[1] After the trial of this cause, Kafton pleaded guilty to the indictment against him. Execution of the sentence imposed was suspended and a fine of $1. was ordered remitted.

[2] *e.g.* The amendment to the New York State Constitution passed in 1938 and approved by the vote of the people on November 8th, 1938 provides as follows: "The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex-parte orders or warrants shall issue only upon or on affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof". Constitution of the State of New York, Article I, Section 12.

the Federal Bureau of Investigation of the Department of Justice to conduct investigations in the interests of national defense, and for that purpose to permit wire tapping in certain cases." Such investigations would be subject to the direction of the Attorney General and would be to ascertain the facts, to prevent and frustrate interference with national defense by means of sabotage, treason, seditious conspiracy, espionage, and so forth. It is provided that Section 605 of the Communications Act of 1934 would not apply to investigations authorized under this bill. This provision could be used, however, only in cases where the Attorney General finds probable cause to believe that any of the above offenses have been or are about to be committed, and then only with certain limitations.

Apparently, there has been no demand for the removal of any of the restrictions on wire tapping as applied to any other situation. On the other hand, the proposed law recognizes the policy of Congress never to permit wire tapping in any situation without definite safeguards and limitations.

Any different interpretation of Section 605 of the Federal Communications Act would impute to it "a self-defeating, if not disingenuous purpose". If wire tapping is a "dirty business" as Justice Holmes characterized it in dissenting in *Olmstead* v. *United States,* 277 U. S. 438, then, we can hardly conceive of any "dirtier business" than the use made of wire tapping in this case and the manner in which it was introduced in the record of the court. The majority opinion of the Circuit Court of Appeals is sound, well reasoned and metes substantial justice. There is no need, we believe, of any further interpretation by this Court of Section 605 of the Federal Communications Act.

Moreover, it is also submitted this case is not a proper one for review. On the entire record and in the interest of substantial justice, these respondents are entitled to a new trial.

Argument.

I.

The Circuit Court of Appeals was correct in holding that the admission in evidence of the reproductions of the intercepted telephone conversations upon rebuttal was prejudicial error.

Nardone v. *United States*, 302 U. S. 379;
Nardone v. *United States*, 308 U. S. 338;
Weiss v. *United States*, 308 U. S. 321.

This Court described its own decision in the first *Nardone* case, 302 U. S. 379, as "not the product of a merely meticulous reading of technical language" but "the translation into practicality of broad considerations of morality and public well-being". (308 U. S. 338, 340.)

Further describing its findings, this Court stated: "This Court found that the logically relevant proof which Congress had outlawed, it outlawed because 'inconsistent with ethical standards and destructive of personal liberty', 302 U. S. 379, 384. To forbid the direct use of methods this characterized but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty'" (308 U. S. 338, 340).

If the Circuit Court of Appeals had given its approval to the legal gymnastics indulged in by the prosecutor to inject into the record of this cause this pernicious wire tapping testimony, then certainly it would invite the very methods deemed "inconsistent with ethical standards and destructive of personal liberty".[3]

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[3] The wire tapping testimony was not offered in the first trial. It was introduced upon rebuttal upon the second trial. The second *Nardone* case and the *Weiss* case were decided by this Court on December 11, 1939. The second trial of the respondents was commenced on January 3rd, 1940.

Petitioner admits that by this Court's decisions, participants to telephonic conversations were deemed to have a right of privacy which public policy required should remain inviolate against unauthorized intrusions by third persons, whether government agents or others (Petition, pp. 7-8). Petitioner contends, however, that there was no interception and no unauthorized invasion of the right of privacy (Petition, pp. 8-10). In this respect the petition reveals a glaring inconsistency. If there was no interception as contended by the petitioner, it is difficult to understand why the prosecutor persisted in attempting to establish that Kafton consented to the interception (R. 203; 204-205). It is argued that there is no interception of a communication which has reached its intended destination. The majority opinion of the Circuit Court of Appeals disposes of this metaphysical distinction without much difficulty (R. 300). Judge Learned Hand wrote:

> "Moreover, the recording was an 'interception'. It is true that in the three decisions in which the Supreme Court has interpreted § 605, Title 47 U. S. Code, the prosecuting agents had physically interposed some mechanism in the circuit as it had been constructed for normal use; at least this is what we understand by a 'tap'. That was not the case here; the recording machine was merely fixed to an existing 'extension' of the familiar kind in an adjoining room. We assume that the situation would have been no different, had the agent merely listened at the extension, and taken down what he heard by shorthand. The statute does not speak of physical interruptions of the circuit, or of 'taps'; it speaks of 'interceptions' and anyone intercepts a message to whose intervention as a listener the communicants do not consent; the means he employs can have no importance; it is the breach of privacy that counts" (R. 301).

Certainly the place where the interception occurred or by what method should not be the determining factor. Sec-

tion 605 of the Federal Communications Act does not contemplate the use of a ruler or any other measuring device. Under the Government's theory there could never be an interception of a telephonic communication as long as the communication has reached its intended destination. Such a theory completely destroys the purpose of Section 605 of the Federal Communications Act and would stultify the policy which compelled this Court's decisions. The Government's theory would reward ingenuity in circumventing the statute. Furthermore, under the theory of the Government, the result would be no different if the extension were located either in the cellar of the building of the Federal Bureau of Investigation or in the cellar of the home of one of the respondents. It is impossible to reconcile the Government's argument with the underlying purpose of Section 605 of the Federal Communications Act.

The petitioner further contends that the consent of Kafton furnished the necessary "consent of the sender" as required by the Statute. As to this, Judge Learned Hand in the majority opinion, wrote as follows (R. 301):

> "So far there can be no reasonable dispute. Every telephone talk, like any other talk, is antiphonal; each party is alternately sender and receiver and it would deny all significance to the privilege created by § 605 to hold that because one party originated the call he had power to surrender the other's privilege."

It is common knowledge that every telephone instrument at both ends of the lines has both a sending and a receiving apparatus. Each participant to a telephonic conversation is alternately a receiver and a sender. Kafton could not consent for either the respondent Albert or the respondent Polakoff to the interception or divulgence of the messages sent by them to Kafton. Kafton was not their agent and no exchange of formalities between Kafton and the Federal agents can have the effect of authorizing or justi-

fying an invasion of their right of privacy which has been given the respondents by the statute and under the Fourth and Fifth Amendments to the Constitution of the United States. The courts will not interpret an act of Congress so as to impute to it a "self-defeating if not disingenuous purpose" (308 U. S. 338, 341).

It will serve no useful purpose to speculate as to possible situations which Section 605 might embrace from a private standpoint as set forth in the dissenting opinion. cf. *Berdau* v. *McDowell*, 256 U. S. 465.

Nor does it matter that Kafton could tell anyone what he had heard respondent say over the telephone. The statute does not purport to deal with Kafton's activities. Such statements by Kafton to third persons would be self-serving declarations; furthermore, the testimony of third persons concerning what Kafton had told them would come within the condemnation of the rule against hearsay testimony. Nor do we need to speculate about the consequences attendant upon the attachment of a loud speaker to the telephone. The majority opinion clearly answers these arguments and defines the scope of Section 605 of the Federal Communications Act. Judge Learned Hand said:

> "We need not say that a man may never make a record of what he hears on the telephone by having someone else listen at an extension, or, as in the case at bar, even by allowing him to interpose a recording machine. The receiver may certainly himself broadcast the message as he pleases, and the sender will often give consent, express or implied, to the interposition of a listener. Party lines are a good illustration; and it would be unwise to try in advance to mark the borders of such implications. Here, however, we need not be troubled by niceties, because, no matter what the scope of any such implied consent, it cannot extend to the intervention of prosecuting agents bent upon trapping the 'sender' criminally" (R. 301-302).

Judge Clark in his dissenting opinion becomes alarmed about the partial privilege that may be obtained by criminals if they take the precaution of communicating with each other by wire or radio (R. 306); there is also a concern in the dissenting opinion over the rejection by the statute of the best evidence (R. 305).

The detection of crime must operate within certain limits. The Fourth and Fifth Amendments to the Constitution of the United States have been barriers, we suppose, to crime detection for many years. Yet no person interested in the protection of the liberty of the individual would seriously support the repeal of these Amendments. Time and again this court, in giving effect to the principle underlying the Fourth Amendment, has refused to place an unduly literal construction upon it.

In *United States* v. *Lefkowitz,* 285 U. S. 452, this Court condemned as unreasonable, a general exploratory search of premises solely for the purpose of obtaining evidence, although the search was made with a warrant or accompanied an arrest.

In *Gouled* v. *United States,* 255 U. S. 298, this Court held that testimony obtained by Federal agents from defendants by stealth and deceit would be a violation of the Fourth and Fifth Amendments to the Constitution of the United States.

In *Ex Parte Jackson,* 96 U. S. 727, it was held that a sealed letter entrusted to the mail is protected by the Amendments.[4]

In the first *Nardone* case, *supra,* this Court wrote that "the same considerations may well have moved the Con-

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[4] The following is the comment of Mr. Justice Brandeis upon this case in his dissenting opinion in *Olmstead* v. *United States,* 277 U. S. 438, 475:

"The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded, and all conversations between them upon any subject, and although proper, confidential, and privileged, may be overheard."

gress to adopt Section 605 as evoked the guaranty against practices and procedures violative of privacy embodied in the Fourth and Fifth Amendments to the Constitution'' 302 U. S. 379, 383. There is therefore ample authority to support the rejection by the Circuit Court of Appeals of wire tapping deliberately used to entrap the respondents criminally.

This Court has put an end to ''wire tapping'' testimony, whether communications that were intercepted were interstate or intrastate. The door should remain closed. Moreover in this particular case the deliberate use of wire tapping testimony upon rebuttal [5] and the tricky circumstances under which it was obtained is shocking to the common man's sense of decency and fair play. If the right of privacy is to prove a valuable social asset, it will be because qualifications and exceptions are not engrafted upon a statute protecting it.

Conclusion.

Petitioner's contentions were carefully reviewed and clearly decided by the court below. The issue was fully explored and the opinion of the majority of the court is sound and well reasoned. The decision of the Circuit Court of Appeals was plainly compelled by the very recent decisions of this Court and it is not in conflict with any other decision by any other Circuit Court of Appeals.

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[5] There is ample authority to sustain the proposition that the admission of this testimony whether competent or incompetent, upon rebuttal, was highly improper. It is not the proper function of rebuttal testimony to confirm and repeat statements and claims which were made part of the prosecution's direct case and were subsequently denied by the defense. 4 *Wigmore on Evidence* (2d Ed.) Section 1873; 64 *Corpus Juris*, Section 177, page 155; *Light* v. *Toledo, St. L. & W. R. Co.*, 208 Fed. 158 (D. C. Ohio, 1913); *Stone* v. *Chicago, M. St. P. & P. R. Co.*, 53 F. (2d) 813 (C. C. A. 8th, 1931).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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